

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ENTECH MANAGEMENT SERVICES CORP.	:	ORDER
	:	DTA NO. 809749
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the period June 1, 1988	:	
through August 31, 1989.	:	

Petitioner, by its duly authorized representative, James E. Rolls, Esq., has brought a motion dated April 20, 1993 pursuant to 20 NYCRR 3000.5 and CPLR 5015(a)(2) to vacate and set aside the determination of the Administrative Law Judge dated January 14, 1993, which denied the petition of Entech Management Services Corp., upon the ground of newly-discovered evidence. Based upon the affidavit of Mr. Rolls dated April 20, 1993 in support of the motion, the affidavit of Deborah J. Dwyer, Esq., dated May 17, 1993 in opposition to the motion and upon all the pleadings and proceedings had herein, the following order is rendered.

FINDINGS OF FACT

The Division of Taxation ("Division") issued two notices of determination and demands for payment of sales and use taxes due both dated May 24, 1990 against petitioner, Entech Management Services Corp. The first one asserted total tax due of \$25,952.78, plus penalty and interest, for the period June 1, 1988 through August 31, 1989.

The second notice asserted omnibus penalty totalling \$2,581.91 against petitioner because the asserted tax omission was greater than 25% of audited tax due for four of the sales tax quarters at issue.

Petitioner requested a prehearing conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") to challenge the notices of determination. A conciliation conference was held on January 16, 1991, at which petitioner appeared by its president, Cosimo S. Polino, Jr. Subsequently, two conciliation orders each dated May 17,

1991 were issued sustaining the notices of determination in full.

On July 5, 1991, a petition challenging the notices of determination was filed with the Division of Tax Appeals. The petition was signed by Cosimo S. Polino, Jr., in his capacity as president of petitioner. The petition listed specific allegations of error and of facts to be proven.

The case was set down for hearing on July 13, 1992 at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York at 1:15 P.M. A two-hour hearing took place at that time before Administrative Law Judge Frank W. Barrie. Petitioner appeared at the hearing by its president, Cosimo S. Polino, Jr., who also testified at the hearing. In addition, an auditor, Claudia J. Sydoriak, testified at the hearing to explain the audit results which formed the basis for the issuance of the notices of determination. Both sides introduced into evidence various documents in support of their respective positions.

The Administrative Law Judge explicitly noted at the hearing that "[O]nce the record is closed as it will be at the end of today's hearing, I won't accept anything further." With that limitation in mind, Mr. Polino was given until August 23, 1992 to submit a notarized copy of an affidavit dated April 10, 1991 of Harold Bogatz included in petitioner's Exhibit "3", which had not been notarized. On August 4, 1992, Mr. Polino submitted a notarized copy of the affidavit of Mr. Bogatz. However, the Administrative Law Judge's review of the affidavit disclosed that petitioner did not submit the document referred to by Mr. Bogatz in his affidavit as his Exhibit "3". Petitioner was given until December 11, 1992 to submit this document for inclusion in the record, and on December 11, 1992 petitioner filed this additional document.

In rendering the determination dated January 14, 1993 which denied the petition and sustained the statutory notices, the testimony of Mr. Polino and of Ms. Sydoriak, the documents introduced into the record by the parties, and the parties' arguments as articulated at hearing were carefully considered.

Petitioner's motion to vacate and set aside the determination of the Administrative Law Judge was brought by a newly-retained representative, attorney James E. Rolls. According to petitioner's attorney, the motion is premised upon the position that:

"After reviewing Judge Barrie's Determination, on or about the 1st day of February, 1993, I discovered new evidence, which is contained in the attached Affidavits of:

- Harold Bogatz, Esq., general counsel for Stoney Point Technical Park (attached as Exhibit A); included with this affidavit is correspondence confirming the statements of fact in said affidavit;
- Alan Rothschild, Esq., the attorney for Insl-X Products, the purchaser of the production area and equipment (attached as Exhibit B); and
- Frank Kobb, Esq., the attorney for Loshell Realty, the purchaser of the office area (attached as Exhibit C)."

According to attorney Rolls, these affidavits demonstrate "that several parts of [Mr. Polino's testimony] were inaccurate, due to Mr. Polino being unaware of the evidence now submitted." An affidavit of Mr. Polino, dated April 20, 1993, was also submitted in support of this application in which he noted that after "conducting a further examination into the facts of this matter, it has become apparent that certain aspects of my testimony before Judge Barrie on July 13, 1992 were either incomplete or in error."

On or about April 2, 1993, an exception to the Administrative Law Judge's determination was received by the Tax Appeals Tribunal. Correspondence between petitioner's counsel and the Secretary to the Tribunal reveals that such exception is being held in abeyance pending the outcome of the instant motion.

OPINION

A. It is observed that the so-called "newly discovered evidence", which petitioner seeks to introduce into the record after a determination has been issued, could have been available at or before the time of the hearing if petitioner had adequately prepared for formal hearing. "[W]here a party fails to adequately prepare for trial, he is not entitled to another trial" (see, Grossbaum v. Dil-Hill Realty Corp., 58 AD2d 593, 395 NYS2d 246, 248). In short, petitioner has failed to show that the newly-discovered evidence could not have been discovered earlier with due diligence (see, Matter of Jenkins Covington N.Y., Tax Appeals Tribunal, November 21, 1991).

B. In Matter of A & J Auto Repair Corp. (Tax Appeals Tribunal, May 6, 1993), the

Tribunal recently reaffirmed "the policy of the Tribunal to disallow the submission of evidence after the record has been closed." Citing its earlier decision in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), the Tribunal noted:

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing."

In Matter of A & J Auto Repair Corp. (supra), the Tribunal observed that the Administrative Law Judge granted the Division 30 days after the hearing, until February 15, 1991, to submit an additional document. The document was not submitted until March 15, 1991, and the Tribunal modified findings of fact made by the Administrative Law Judge based on the late-submitted document, which it stressed "was improperly allowed into evidence."

In Matter of A & J Auto Repair Corp. (supra), the evidence which the Tribunal concluded was improperly admitted into the record was submitted before the Administrative Law Judge in that matter had issued his determination. Nonetheless, the Tribunal's commitment to the principle of finality was unbending.

In the matter at hand, petitioner seeks to introduce additional evidence after the determination has been issued. In effect, petitioner's motion utilizes the determination of the Administrative Law Judge issued on January 14, 1993 as a guide for reopening a hearing for which petitioner was apparently underprepared. As a result, petitioner's motion must be denied. To rule otherwise would eviscerate the administrative process and frustrate the purpose of the Division of Tax Appeals "to provide the public with a clear, uniform, rapid, inexpensive and just system of resolving controversies with the Division of Taxation" (20 NYCRR 3000.0[a]; see, Matter of Jenkins Covington, N.Y., supra).

C. Petitioner's motion to vacate and set aside the determination of the Administrative Law Judge dated January 14, 1993 is denied.

DATED: Troy, New York
June 10, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE